

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

United States of America,

Plaintiff,

v.

James David Bennett,

Defendant.

CASE NO. SACR 03-25 AHS

**ORDER DENYING MOTION TO  
RECUSE**

On April 26, 2008,<sup>1</sup> defendant James David Bennett (“Bennett”) filed a Motion to remove the assigned District Judge, the Honorable Alice Marie Stotler, Chief Judge. (Docket No. 419.) Pursuant to General Order 08-01 and Local Rule 72-5, the Motion was assigned to the undersigned for decision. (Referral of Motion to Disqualify Judge, May 2, 2007 (Docket No. 420).) Bennett premises his claim for relief on 18 U.S.C. § 144 and 455. The Motion is procedurally deficient under Section 144 and substantively deficient under both statutes. The Motion suffers from the same defects as Bennett’s previous recusal

<sup>1</sup>Although the present motion was filed May 2, 2008, the Court assumes that Bennett is entitled to the “mail box” rule, and that he tendered the motion for mailing on the date he signed the pleading.

1 Motion. (See Docket No. 304.) It is also untimely. For the reason set forth  
2 below, the Court finds that the Motion is without merit, and denies the Motion.

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4 I. Background.

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6 At the heart of Bennett's claim is the assertion that the lender under  
7 counts five, six, and seven of the charging indictment was in fact Long Beach City  
8 Mortgage, a non-federally-insured lender. (Motion, p. 1.) He contends that the  
9 Government was allowed to show that the lender was Flagstar Bank, a federally-  
10 insured institution. Bennett asserts that "with the help, support, and direct  
11 participation" of Chief Judge Stotler and "her court appointed attorney" for  
12 Bennet, the Assistant United States Attorneys ("AUSAs") assigned to the case  
13 corruptly influenced the Grand Jury and the trial jury. (Id.) In furtherance of this  
14 scheme, Chief Judge Stotler allegedly allowed one of the AUSAs to suborn  
15 perjury of a Flagstar witness at trial. (Id. at 4.) He also accuses Chief Judge  
16 Stotler of "indictment swapping" by substituting the "Trial Indictment" for the  
17 Second Superceding Indictment. (Id. at 3, 6.)

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19 II. Disqualification under Section 144.

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21 Section 144 provides a mechanism for disqualification of a judge:

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23 Whenever a party to any proceeding in a district court makes and  
24 files a timely and sufficient affidavit that the judge before whom the  
25 matter is pending has a personal bias or prejudice either against him  
26 or in favor of any adverse party, such judge shall proceed no further  
27 therein, but another judge shall be assigned to hear such proceeding.  
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1           The affidavit shall state the facts and the reasons for the belief that  
 2           bias or prejudice exists, and shall be filed not less than ten days  
 3           before the beginning of the term at which the proceeding is to be  
 4           heard, or good cause shall be shown for failure to file it within such  
 5           time. A party may file only one such affidavit in any case. It shall be  
 6           accompanied by a certificate of counsel of record stating that it is  
 7           made in good faith.

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 9       28 U.S.C. § 144 (emphasis supplied). For present purposes, “personal bias”  
 10       means a bias derived from extra-judicial origins, as opposed to an opinion formed  
 11       during the course of litigation. Craven v. Unites States, 22 F.2d 605, 607 (1<sup>st</sup> Cir.  
 12       1927); accord United States v. Carignan, 600 F.2d 762, 763-64 (1979). It is an  
 13       “attitude toward [the challenging party] that is significantly different from and  
 14       more particularized than the normal general feeling of society at large.” Mims v.  
 15       Shapp, 541 F.2d 415, 417 (10<sup>th</sup> Cir. 1977). Contrary to a facial reading, Section  
 16       144 is not self-executing: The Court must determine whether the affidavit of  
 17       prejudice is legally sufficient. Underseas Engineering & Constr. Co. v.  
 18       International Tel. & Tel. Corp. 429 F.2d 543, 545 (9<sup>th</sup> Cir. 1970).

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 20           However, as a threshold matter, a key procedural defect bars any  
 21       relief under Section 144. Bennett has tendered no good faith certificate of counsel  
 22       of record. Williams v. New York City Housing Authority, 287 F.Supp. 2d 247,  
 23       249 (S.D. N.Y. 2003). The certificate of counsel serves a preventative purpose to  
 24       avoid the filing of frivolous affidavits. As a *pro per* plaintiff, Bennett cannot  
 25       make the certification, and while other remedies may be available to him, he is  
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1 barred from seeking relief under Section 144.<sup>2</sup> Id.; Robinson v. Gregory, 929 F.  
2 Supp. 334, 337-38 (S.D. Ind. 1996).

3  
4 However, this procedural defect does not work to Bennett's prejudice  
5 Bennett because he also seeks relief under 28 U.S.C. § 455.

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7 III. Disqualification under Section 455.

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9 A. Appearance of a Lack of Impartiality.

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11 Section 455(a) provides a broad, fact-driven rule for disqualification:  
12 "Any justice, judge, or magistrate judge of the United States shall disqualify  
13 himself in any proceeding in which his impartiality might reasonably be  
14 questioned." The fact that a judge has made rulings adverse to a party, standing  
15 alone, is not a basis for disqualification. Liteky v. United States, 510 U.S. 540,  
16 555 (1994).

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18 Chief Judge Stotler's rulings during the trial related to Flagstar,  
19 including the form of verdict and indictment submitted to the jury, do not form a  
20 basis for recusal. Bennett's remedy for the substantive rulings which he cites on  
21 this Motion is in the Court of Appeals and not by way of disqualification. Id.  
22 Bennett's assertion that he now has new evidence that Long Beach City Mortgage  
23 made the loan does not change the result. (Motion, p. 5.)

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<sup>2</sup>Arguably, the Motion is also barred as untimely. Bennett offers no basis for good cause to bring  
the Motion after the first ten days of the term. 28 U.S.C. § 144.

1           Beyond the broad-brush assertions in his memorandum and affidavit,  
2   there is no support for Bennett's claims of a cabal to taint the Grand Jury and the  
3   trial jury. No facts are offered to support the claim that Chief Judge Stotler was  
4   involved in any way, either directly or indirectly, in the Grand Jury proceedings.  
5   There is no support for the claim that Chief Judge Stotler was involved in  
6   allegedly suborning perjury of the Flagstar witness

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8           In short, Bennett has not come forward with facts which would cause  
9   a reasonable person to believe that Chief Judge Stotler is biased against him or  
10   otherwise lacking impartiality. Indeed, the fact that Chief Judge Stotler granted a  
11   partial acquittal on Bennett's post-verdict motion would suggest just the opposite.  
12   (Order Denying Part and Granting in Part Defendant's Motion for Judgement  
13   Acquittal, May 24, 2006 (Docket No. 254).)

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15           B. Timeliness.

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17           Case law interpreting Sections 144 and 455 requires that any motion  
18   be timely made. United States v Branco, 798 F.2d 1302, 1304-05 (9<sup>th</sup> Cir. 1986);  
19   United States v. Conforte, 624 F.2d 869, 879 (9<sup>th</sup> Cir.), cert. denied, 449 U.S. 1012  
20   (1980); accord United States v. Brinkworth, 68 F.3d 633, 639 (2d Cir. 1995).  
21   Intradistrict Change of Venue.


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23           The events which Bennett cites are more than three years old. The  
24   trial took place in the fall of 2004. At the time, he was necessarily aware of his  
25   contention that Long Beach City Mortgage was the true lender. He offers no  
26   reason for his delay. That he recently discovered new evidence that supports his  
27   contention is irrelevant because he was always believed that Long Beach City  
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1 Mortgage had been the lender. As evidenced by his earlier recusal motion, he is  
2 plainly aware the avenues for relief. Apart from the substantive and procedural  
3 defects noted above, the Motion is untimely.

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5 IV Conclusion.

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7 Bennett's Motion to disqualify Chief Judge Stotler is denied.

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9 Dated: May 7, 2008

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11 James V. Selna  
12 United States District Judge  
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